

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOEL M. CRAM, et al.,) Civil No.07cv1842-LAB(NLS)
v.)
Plaintiffs,) **ORDER RE: PLAINTIFFS' EX PARTE
APPLICATION FOR ORDER
AUTHORIZING PRE-HEARING
DISCOVERY**
ELECTRONIC DATA SYSTEMS) [Doc. No. 8]
CORPORATION, et al.,)
Defendants.)

On September 25, 2007, Plaintiffs in the above-captioned matter filed an *Ex Parte* Application for Order Authorizing Pre-Hearing Discovery in Relation to Motion for Remand [Doc. No. 8], along with several supporting documents [Doc. Nos. 9-11]. Plaintiffs' request leave of court to commence and conduct discovery in advance of the November 13, 2007 hearing date set before presiding District Judge Larry A. Burns on their pending motion to remand this case to state court. Defendants filed an opposition to the *ex parte* application [Doc. No. 12] and Plaintiffs filed a reply [Doc. No. 16]. For the following reasons, the Court **GRANTS** Plaintiffs' *Ex Parte* Application [Doc. No. 8].

BACKGROUND

On August 21, 2007, Plaintiffs Joel M. Cram and Minh D. Nguyen (“Plaintiffs”) filed a putative class action complaint in San Diego County Superior Court against Defendant Electronic Data Systems Corporation (“Defendant”) alleging causes of action for: (1) unpaid overtime compensation in violation of California Labor Code (“CLC”) Sections 510 and 1194; (2) waiting penalties pursuant to CLC Sections 201-203; and (3) unfair competition in violation of California Business and Professions Code

1 Section 17200 *et seq.* (See Plaintiffs' Complaint ¶¶ 28-48.) On September 20, 2007, Defendant
 2 removed the action to this Court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28
 3 U.S.C. § 1332(d), which provides federal district courts with original jurisdiction over class actions with
 4 100 or more putative class members, where the amount in controversy exceeds the sum or value of
 5 \$5,000,000, and where "minimal" diversity of citizenship exists between at least one class member and
 6 the defendant. See 28 U.S.C. § 1332(d)(2).

7 Plaintiffs filed this action as a class action involving allegedly more than 100 putative class
 8 plaintiffs. (Complaint ¶ 26.a.) Accordingly, by Plaintiffs' own allegations, the first requirement to
 9 support this Court's jurisdiction under CAFA is met. Defendant asserts in the Notice of Removal that
 10 diversity of citizenship exists between individually named Plaintiffs Cram and Nguyen, both citizens of
 11 California, and Defendant, which is incorporated in Delaware. (Defendant's Notice of Removal ¶¶ 10-
 12 11.) Plaintiffs do not dispute this assertion. (Complaint ¶¶ 4,5, & 8.) Therefore, the second
 13 requirement to support this Court's jurisdiction under CAFA is also met. However, the parties disagree
 14 as to whether the third and final requirement for jurisdiction, amount in controversy, is satisfied.
 15 Defendant makes specific allegations in the Notice of Removal regarding the amount placed in
 16 controversy by Plaintiffs' complaint, arguing that the amount exceeds \$10,000,000, plus attorneys' fees
 17 and expenses, and therefore easily satisfies the \$5,000,000 requirement under §1332(d). (*Id.* ¶ 14.)

18 Plaintiffs dispute Defendant's allegations regarding amount in controversy, and on September
 19 25, 2007, filed a Motion to Remand this matter back to state court arguing that the amount in
 20 controversy requirement is not met [Doc. No. 3]. The motion to remand is set for hearing on November
 21 13, 2007 before presiding District Judge Larry A. Burns. Also on September 25, 2007, Plaintiffs filed
 22 the instant *ex parte* application, seeking jurisdictional discovery from Defendant regarding the amount
 23 in controversy alleged by Defendant in the Notice of Removal [Doc. No. 8]. Plaintiffs argue that any
 24 and all evidence which may establish that the amount in controversy exceeds \$5,000,000 is in the
 25 exclusive possession of Defendant, and that denial of discovery prior to the hearing on the motion to
 26 remand could result in an erroneous exercise of subject matter jurisdiction by this Court. (*Memorandum*
 27 *in Support of Plaintiffs' Ex Parte Application*, 3.)

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1 Defendant filed an opposition to Plaintiffs' request for pre-hearing discovery [Doc. No. 12].
 2 First, Defendant argues that Plaintiffs' *ex parte* application is procedurally inappropriate, and that
 3 Plaintiffs should have filed a fully noticed motion to compel the requested discovery. Second,
 4 Defendant contends that Plaintiffs' discovery request lacks the requisite detail necessary for the Court to
 5 determine whether and to what extent any discovery should be allowed. Third, Defendant argues that
 6 there is no basis for the "expedited" jurisdictional discovery that Plaintiffs seek because challenges to
 7 subject matter jurisdiction under CAFA can be raised at any time. Finally, Defendant argues that the
 8 instant proceedings could have been avoided if Plaintiffs had continued to engage in meet and confer
 9 discussions with Defendant regarding Defendant's potential willingness to provide Plaintiffs with
 10 further documentation supporting jurisdictional amount. Defendant asserts that as a result of Plaintiffs'
 11 hasty filing, their *ex parte* application has caused unnecessary expense to both the parties and the Court.
 12 (*Defendant's Opposition*, 2-3.) Plaintiffs filed a reply, in which they defend their choice of procedural
 13 mechanism as proper and necessary given the hearing date currently set on the motion to remand.
 14 (*Plaintiffs' Reply*, 2.) Plaintiffs also attempt to clarify the discovery sought, stating that discovery is
 15 only directed to Defendant and includes information regarding Defendant's staffing, payroll, and record-
 16 keeping practices with respect to the putative plaintiff class. (*Id.* at 3-4.)

17 DISCUSSION

18 A. Legal Standard

19 1. Discovery in General

20 The Federal Rules allow for broad discovery in civil actions: "Parties may obtain discovery
 21 regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . Relevant
 22 information need not be admissible at trial if the discovery appears reasonably calculated to lead to the
 23 discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). This provision is liberally construed to
 24 provide wide-ranging discovery of information necessary for parties to evaluate and resolve their
 25 dispute. *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1995). The party seeking to
 26 compel discovery has the burden of establishing that its request satisfies the relevancy requirements of
 27 Rule 26(b)(1). *Soto v. City of Concord*, 162 F.R.D. 603, 610 (N.D. Cal. 1995). In turn, the party
 28 opposing discovery has the burden of showing that discovery should not be allowed, and also has the

1 burden of clarifying, explaining and supporting its objections. *DirectTV, Inc. V. Trone*, 209 F.R.D. 455,
 2 458 (C.D. Cal. 2002); *Oakes*, 179 F.R.D. at 283.

3 **2. Amount in controversy under CAFA**

4 The general principles embodied in the Federal Rules of Civil Procedure which support liberal
 5 discovery in civil cases must be considered in tandem with the body of case law that has developed
 6 specifically to address pre-class certification discovery in cases removed to federal court pursuant to
 7 CAFA. Generally in purported class actions, the amount in controversy is to be decided from the
 8 complaint itself. *Richmond v. Allstate Ins. Co.*, 897 F. Supp. 447, 449 (S.D. Cal. 1995). *See also*
 9 *Pachinger v. MGM Grand Hotel-Las Vegas, Inc.*, 802 F.2d 362, 363 (9th Cir. 1986) (“The amount in
 10 controversy is normally determined from the face of the pleadings.”) The calculation of the amount in
 11 controversy takes into account claims for “general” damages, “special” damages, punitive damages if
 12 recoverable as a matter of law, and attorneys’ fees recoverable by statute or contract. *Id.* (citations
 13 omitted). The amount in controversy does not include accruing or accrued interest or the costs of the
 14 suit. *Id.* (citation omitted). According to the Report of the Senate Committee on the Judiciary on
 15 CAFA, the requirement under CAFA that the amount in controversy exceed \$5,000,000 in the aggregate
 16 may be established “either from the viewpoint of the plaintiff or the viewpoint of the defendant, and
 17 regardless of the type of relief sought (e.g., damages, injunctive relief, or declaratory relief).” S. Comm.
 18 on the Judiciary, Class Action Fairness Act of 2005, S.Rep. No. 109-14, at 40 (Feb. 28, 2005), reprinted
 19 in 2005 U.S.C.C.A.N. 3, 2005 WL 627977.

20 The procedure in the Ninth Circuit for determining the amount in controversy on removal
 21 requires a district court to first consider whether it is “facially apparent” from the complaint that the
 22 jurisdictional amount is in controversy. *See Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377
 23 (9th Cir. 1997). If it is not, the court may consider facts in the removal petition as well as evidence
 24 submitted by the parties, including “summary-judgment-type evidence relevant to the amount in
 25 controversy at the time of removal.” *Id.* A defendant who bears the burden of proving the propriety of
 26 removal must provide facts supporting its assertions as to the minimum jurisdictional requirement. *See,*
 27 *e.g., Alexander v. FedEx Ground Package System, Inc.*, 2005 WL 701601, at *1 (N.D. Cal. 2005), citing
 28 *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992).

1 Jurisdictional discovery is permissible when the Court is unable to determine, on the existing
 2 record, whether it has jurisdiction. *See generally Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d
 3 406, 430 n.24 (9th Cir. 1977); *GTE New Media Servs., Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351-52
 4 (D.C. Cir. 2000). Such discovery should be “precisely focused” and “aimed at addressing matters
 5 relating to [] jurisdiction.” *See GTE*, 199 F.3d at 1352; *see also Crane v. Carr*, 814 F.2d 758, 764 (D.C.
 6 Cir. 1987) (finding that “reasonable discovery addressed to the jurisdictional issue” should be
 7 permitted). Jurisdictional discovery in CAFA cases, as in pre-CAFA cases, should be “sufficiently
 8 tailored” to lead to information concerning the jurisdictional issue. *See Rippee v. Boston Market Corp.*,
 9 408 F.Supp.2d 982, 985 (S.D.Cal. 2005) *citing Schwartz v. Comcast Corp.*, 2005 WL 1799414, at *7
 10 (E.D. Pa. July 28, 2005).

11 **B. Analysis**

12 Plaintiffs seek jurisdictional discovery regarding the amount in controversy asserted in
 13 Defendant’s Notice of Removal. Plaintiffs argue that they require limited discovery on this issue in
 14 order to support their pending motion to remand, which rests on the single contention that the amount
 15 placed in controversy by their complaint does not meet the \$5,000,000 threshold required by CAFA.
 16 (*Plaintiffs’ Memorandum*, 2-3.) In support of this request, Plaintiffs cite the preponderance of the
 17 evidence standard that will apply on the motion to remand. (*Plaintiffs’ Reply*, 2.) Plaintiffs contend that
 18 if they are not permitted to discover information solely in Defendant’s possession regarding the amount
 19 in controversy in this case, they will be unduly prejudiced in litigating their remand motion. (*Id.*)

20 Defendant raises several arguments in opposition to Plaintiffs’ request. First, Defendant
 21 contends that Plaintiffs’ *ex parte* application is procedurally improper, Plaintiffs should be proceeding
 22 via noticed motion, and no urgency exists to support jurisdictional discovery on an expedited basis.
 23 (*Defendant’s Opposition*, 4.) Pursuant to Civil Local Rule 26.1.e, all requests of the Court to compel
 24 discovery are referred to the magistrate judge assigned to the case, who retains discretion to waive all or
 25 part of the motion practice requirements of Civil Local Rule 7.1. It is well within this Court’s discretion
 26 to accept Plaintiffs’ request as an *ex parte* application and rule on the application in an expedited basis.
 27 Thus, Defendant’s procedural argument is unavailing. Furthermore, to the extent that Defendant argues
 28 “there is no urgency for the remand motion to be heard,” and therefore no basis for ruling on Plaintiffs’

1 *ex parte* application expeditiously, this argument also fails. This Court exercised its discretion to hear
 2 this matter on an expedited basis because Plaintiffs seek discovery that allegedly is relevant to the
 3 disposition of a motion currently pending before the presiding district judge, set for hearing in
 4 approximately six weeks. Although the statutory basis for jurisdiction in this case may not dictate
 5 accelerated consideration of Plaintiffs' request, the hearing date set by the district judge on Plaintiffs'
 6 pending motion to remand this case to state court does so require.

7 Defendant next argues that Plaintiffs filed this *ex parte* application prematurely based on the fact
 8 that the parties engaged in only a limited attempt to meet and confer prior to Plaintiffs filing the
 9 application. (*Defendant's Opposition*, 5.) Defendant states that the meet and confer consisted of a
 10 single phone call lasting approximately one half of an hour, and that counsel for Defendant offered
 11 during the course of the discussion to provide Plaintiffs with supplemental information to resolve the
 12 amount in controversy issue and avoid the current proceedings. (*Id.*; *Declaration of Martin T. Wymer ¶¶*
 13 4-5.) Based on Defense counsel's own Declaration filed in support of Defendant's opposition, the meet
 14 and confer requirement was met by the parties prior to Plaintiffs filing the *ex parte* application.¹
 15 Therefore, Defendant's contention that Plaintiffs should have put forth additional effort to resolve the
 16 instant dispute prior to seeking relief from the Court is without legal merit.

17 The Court notes that Defendant's arguments are almost entirely procedural in nature. Defendant
 18 does not raise a substantive basis for why the Court should prohibit Plaintiffs from conducting limited
 19 discovery in this matter, when the relevant case law as well liberal discovery rules tend to support the
 20 request. In addition, the Court appreciates that Defendant offered to provide relevant information
 21 voluntarily to Plaintiffs in order to resolve the amount in controversy issue without the involvement of
 22 the Court. (*Defendant's Opposition*, 2, 5; *Declaration of Martin T. Wymer ¶ 5.*) Based on Defendant's
 23 demonstrated willingness to provide Plaintiffs with information to support the assertion that the amount
 24 placed in controversy by Plaintiffs' complaint exceeds \$5,000,000, and Plaintiffs' request for such
 25 information, and in consideration of the Ninth Circuit's approach to pre-remand discovery in CAFA
 26 cases, the Court shall allow expedited, limited discovery to go forward on the single issue of amount in

27
 28 ¹ Pursuant to Civil Local Rule 26.1.a, “[t]he court shall entertain no motion pursuant to Rules 26 through 37, Fed. R. Civ. P., unless counsel shall have previously met and conferred concerning all disputed issues. (. . .) If counsel have offices in the same county, they are to meet in person. If counsel have offices in different counties, they are to confer by telephone.”

1 controversy. However, the Court notes that a defendant's burden is to produce underlying *facts* showing
 2 only that it is more likely than not that the amount in controversy exceeds \$5,000,000.00, assuming the
 3 truth of the allegations plead in the plaintiff's complaint. *Singer v. State Farm Mut. Auto. Ins. Co.*, 116
 4 F.3d 373, 376 (9th Cir. 1996); *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir.1996).
 5 Thus, a defendant is generally not obligated to support removal with production of extensive business
 6 records to prove or disprove liability and/or damages with respect to putative class members at the
 7 pre-certification stage of the litigation. *McCraw v. Lyons*, 863 F.Supp. 430, 434 (W.D.Ky. 1994)
 8 (recognizing that the preponderance of the evidence standard does not place a "daunting" burden on the
 9 defendant to prove the plaintiff's claims for damages). Therefore, the Court shall limit not only the
 10 scope and duration of jurisdictional discovery, but also shall restrict the discovery method to the use of
 11 interrogatories only, in the interest of judicial economy and in an effort to lessen the burden that this
 12 discovery may place on the parties.²

CONCLUSION

14 Based on the foregoing reasons, the Court **GRANTS** Plaintiffs' *Ex Parte* Application [Doc. No.
 15 8] and shall allow both parties to conduct expedited, limited discovery on the single issue of whether the
 16 amount placed in controversy by the allegations in Plaintiffs' complaint exceeds the \$5,000,000
 17 requirement set forth by CAFA. *See* 28 U.S.C. § 1332(d). Pursuant to Federal Rule of Civil Procedure
 18 33, Plaintiffs and Defendant shall be allowed to propound on the other a single set of interrogatories, not
 19 to exceed **ten (10)** in number for each side, directed specifically towards this issue. This expedited
 20 discovery shall be completed within thirty (30) days of the date of this order. Failure to comply with
 21 this order shall be grounds for the imposition of sanctions, including but not limited to exclusion of
 22 evidence, taking certain facts as established, and/or monetary sanctions. *See* FED. R. CIV. P. 37(c).

IT IS SO ORDERED.

24 DATED: October 3, 2007

25 
 26 Hon. Nita L. Stormes
 U.S. Magistrate Judge

28 ² The answering party shall "furnish such information as is available to the party" after conducting a reasonable inquiry. *See* FED. R. CIV. P. 33(a). Each interrogatory must be answered separately and under oath. FED. R. CIV. P. 33(b).